

THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5, INC., A DELAWARE
CORPORATION; AND POND5 USER
CKENNEDY342, A CORPORATION OR
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

No.: 3:15-cv-05696-BJR

**DEFENDANT POND5, INC.'S
RESPONSE TO PLAINTIFF'S
SUPPLEMENTAL SUBMISSION
(DKTS. 60, 61, 61-1)**

I. INTRODUCTION

Plaintiff filed a "Supplemental Submission in Support of Response to Order to Show Cause and in Support of Pending Motions" (Dkt. 60) and the Declaration of Cynthia Heidelberg in Support of Supplemental Submission in Support of Response to Order to Show Cause (Dkt. 61) and attached exhibit (Dkt. 61-1) (collectively referred to as "plaintiff's Supplemental Submission"). Pond5 submits this response and, for the reasons that follow, requests that the Court strike plaintiff's Supplemental Submission in its entirety.¹

¹ Pond5 submits this Response under LCR 7(g). While, technically, plaintiff's Supplemental Submission does not call for a response in that it is not presented as a motion and is not noted for consideration on any particular day, Pond5 requests that this Court consider its response and request to strike. If the Court would prefer to consider the issues raised by plaintiff's Supplemental Submission and Pond5's Response in some other way, Pond5 is prepared to follow the Court's direction and provide the Court with whatever would assist the Court.

II. ARGUMENT

Pond5 requests that the Court strike plaintiff's Supplemental Submission. The plaintiff filed his Supplemental Submission without an accompanying motion seeking leave to file the document. In fact, even if the plaintiff's failure to include a motion were somehow overlooked, nowhere in the Supplemental Submission does the plaintiff provide citation to any Federal Rule of Civil Procedure or Local Rule that permits such a supplement, and plaintiff fails to articulate any legal basis providing a right to file it. Plaintiff simply filed the Supplemental Submission without asking the Court to consider it and without providing a legal basis for filing it. The document should be stricken.

Plaintiff's Supplemental Submission states that it is "in response to the Court's October 25, 2016 Order to Show Cause (Dkt. 50) and in support of Plaintiff's Motion to Compel (Dkt. 33) and Plaintiff's Motion [for] Leave to Amend (Dkt. 36)." The Supplemental Submission wrongly asserts that these two motions are "pending" (Dkt. 60 at 2) and, based upon the fact that it seeks to supplement the record associated with the Order, strongly implies that the Order to Show Cause is similarly pending. In fact, the Court has already ruled on one of the two motions (see Dkt. 56 (striking the motion to compel as moot and stating that the Court will revisit the issue, if necessary, after reviewing the motion for reconsideration)² and has issued a ruling on the Order to Show Cause (see Dkt. 55 (dismissing user ckennedy342)). Thus, two of the three filings that the Supplemental Submission purportedly relates to have already been decided. With respect to those, plaintiff should have and could have brought a motion for reconsideration, but he didn't, presumably because the deadline to do so has passed. Additionally, plaintiff's Supplemental Submission follows a motion for reconsideration of the Court's Order granting summary judgment, which relied heavily upon evidence that he could have submitted before the Court ruled on the motion for summary judgment. Combined, they create an unmistakable

² Dkt. 57 ordered Pond5 to respond to the motion for reconsideration without any discussion of the motion to compel. The motion for reconsideration has been fully briefed.

1 pattern and practice – if plaintiff is unhappy with an Order by this Court, he simply submits
2 different evidence, claims that it should carry great weight, and pleads with the Court to consider
3 it. This practice is improper. It forces Pond5 to re-litigate issues that have already been fully
4 briefed and/or decided, unnecessarily increases Pond5’s defense costs, and wastes the valuable
5 time of this Court. The Supplemental Submission should be stricken.

6 Plaintiff, as he has in recent pleadings (see, e.g., reply in support of motion for
7 reconsideration, Dkt. 49, at 1), might argue that request to strike is simply an effort by Pond5 to
8 emphasize form over substance or that Pond5 is attempting to use procedural rules to create a
9 “gotcha” (*id.* at 3), but Pond5 has a right to defend itself, and that right includes a requirement
10 that plaintiff follow the Civil Rules or articulate some basis for filing a document that is not
11 otherwise allowed by the rules. Moreover, Pond5 should not be forced to re-litigate issues that
12 were already decided.

13 Plaintiff argues that Pond5’s decision not to disclose a rebuttal expert and provide an
14 expert report is the basis for his filing of the Supplemental Submission, but this argument is
15 misplaced. Pond5 is under no obligation to explain to the plaintiff its reasoning for not
16 submitting a rebuttal expert, but one consideration was the fact that the Court granted summary
17 judgment disposing of the claims that plaintiff brought. It would seem to be an inefficient use of
18 resources to pay an expert to opine on issues that are related to claims that have been summarily
19 adjudicated.

20 Nonetheless, even if that axiomatic explanation is ignored, plaintiff’s assertion that
21 Pond5’s decision not to name a rebuttal expert constitutes some sort of admission that his
22 expert’s opinions are valid borders on absurdity. There are many possible explanations for a
23 defendant’s decision not to offer a rebuttal expert. Perhaps the defendant believes that the
24 plaintiff’s expert can be effectively cross-examined and that a rebuttal expert is unnecessary.
25 Alternatively, a defendant might reasonably conclude that the proffered expert is unqualified and
26 will be excluded, eliminating the need for a rebuttal expert. Plaintiff’s logic that Pond5’s
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1 decision not to name a rebuttal expert evidences agreement with plaintiff's experts fails any
2 reasoned analysis. As such, the fact that Pond5 did not identify a rebuttal expert cannot serve as
3 the basis upon which to draw any conclusions regarding the admissibility, reliability, or weight
4 of plaintiff's expert. Pond5 urges the Court to reject plaintiff's illogical argument.

5 **III. CONCLUSION**

6 For the foregoing reasons, Pond5 respectfully requests that this Court strike plaintiff's
7 Supplemental Submission and the Heidelberg Dec. and exhibit (Dkts. 60, 61, and 61-1).

8 **DATED** this 7th day of December, 2016.

9 NICOLL BLACK & FEIG PLLC

10
11 /s/ Larry E. Altenbrun

12 Curt H. Feig, WSBA No. 19890

13 Larry E. Altenbrun, WSBA No. 31475

14 Attorneys for Defendant Pond5, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of the Court using the CM/CF system which will send notification of such filing to the following:

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DATED this 7th day of December, 2016.

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